IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NOS. 66 OF 2000 AND 15 OF 2003.

Employees State Insurance
Corporation, represented by
the Manager, ESI Corporation,
Margao. ... Appellant.

Versus

1. M/s. Penthouse Beach
   Resort, Colva.
2. Shri Joey de Souza,
   Opposite Holy Spirit
   Church, Margao. ... Respondents.

Mrs. A.A. Agni with Mrs. A. Desai, Advocates for the Appellant in both Appeals.

Mr. C.A. Ferreira, Advocate for the Respondents in both Appeals.

Coram : P.V. HARDAS, J.

Date : 13th June 2003.

ORAL JUDGMENT.

The appellant/original complainant being aggrieved by the Judgment of the Judicial Magistrate, First Class, Margao, dated 21st February 2000, in Labour Case No. 245/L/98/II, acquitted the accused for an offence punishable under Section 85(i)(a)(b) of The Employees' State Insurance Act, 1948, has filed Criminal Appeal No. 66 of 2000.

2. The appellant/original complainant being aggrieved by the acquittal of the accused in Labour Case No. 248/L/98/II by the said Judgment for an offence punishable under Section 85(e) of The Employees' State Insurance Act, has filed Criminal Appeal No. 15 of

2003. The learned trial Court had decided both the Criminal Cases by a common Judgment and, therefore, both the appeals are being decided by this common Judgment.

3. The brief facts necessary for the decision of the appeal are stated hereunder:-

The appellant/original complainant filed a complaint before the Judicial Magistrate, First Class, Margao, bearing Labour Case No. 245/L/98/II on the allegations that the respondents/accused had failed to pay the contribution for the period from July 1997 to September 1997, thus, committing the offence as aforestated. The second complaint was filed bearing Labour Case No. 248/L/98/II alleging therein that the accused had failed to submit four copies of the returns in Form No. 6 within 42 days and, thus, committed the offence as aforestated. The learned Judicial Magistrate, First Class, explained the substance of accusation to the accused, who pleaded not guilty and claimed to be tried.

4. The appellant/original complainant in support of his case examined one witness, namely, P.W.1 K.K. Sukvani. P.W.1 Sukvani stated that the accused had failed to pay the contribution for the period from July 1997 to September 1997 and also that the accused had

failed to submit four copies of the returns in Form No. 6. He also produced at Exhibit P.W.1/A a sanction to prosecute the accused issued by the Regional Director of Employees' State Insurance in respect of Labour Case No. 245/L/98/II. He produced a sanction, at Exhibit P.W.1/C, in respect of Labour Case No. 248/L/98/II. In cross-examination he denied the suggestion of the accused that the accused had informed him that the hotel was closed. He volunteered that the accused had informed him on 10th August 1998 that the hotel was being renovated. He denied the suggestion that the hotel was closed. He admitted further in the cross-examination that the contribution had been paid up to June 1997 and it was so recorded in the register. To the question whether hotel is closed from April 1997?, the answer is "renovation employees have to be covered and security guards have to be covered". He admits to have visited the hotel in February 1998 and at that time he found that the hotel was closed. He denied the suggestion that it was not true to suggest that there was no sanction for prosecution. He also denied the suggestion that P.W.1/A and P.W.1/C had not been issued by the Regional Director and, therefore, the sanction orders do not contain the seal. In his statement under Section 313 of the Code of Criminal Procedure, the accused has denied that there was any valid sanction.

5. The learned Judicial Magistrate, First Class, on consideration of the entire evidence, acquitted the accused on two grounds (1) that the defence of the accused that the hotel was closed from April 1997 had been probabilized and (2) that the complainant had not proved the valid sanctions at Exhibits P.W.1/A and P.W.1/C as the said sanction orders did not bear the seal of the Regional Director.

6. Coming to the question of validity of sanctions, I have perused the original records and proceedings. Exhibits P.W.1/A and P.W.1/C are typed on ordinary paper, which bear a signature styled as Regional Director. P.W.1 Sukvani in his evidence also does not state that he identifies the signature of the Regional Director. All that he does is he produces the two sanctions by saying that these are the sanctions recorded by the Regional Director. He makes no reference to the fact that they bear the signatures of the Regional Director and that he identifies the signatures or that the sanction orders have been signed by the Regional Director in his presence. It is needless to state that when the prosecution relies on the sanction orders, the prosecution has to prove the sanction orders were issued by the concerned authority. Mere production of the sanction orders would not amount to proof of either the fact that the sanction orders

were signed by the concerned authority.

7. Section 86 of the Employees' State Insurance Act 1948, mandates that no prosecution under this Act shall be instituted except by or with the previous sanction of the Insurance Commissioner or of such other officer of the Corporation as maybe authorised in this behalf by the Director General of the Corporation. Thus, it would be seen that the existence of a valid sanction under Section 86(1) is a sine qua non before a prosecution can be instituted against the accused under the Employees' State Insurance Act. The prosecution, therefore, which relies on the sanction order so produced in the case is under the responsibility to prove the same as per the provisions of the Indian Evidence Act. In this case P.W.1 Sukvani only produces the sanction and production of the sanction order, according to me, is no substitute for leading evidence for proving the validity of the sanction order.

8. Mrs. Agni, the learned counsel appearing on behalf of the appellant has relied upon the Judgment of the Supreme Court in **State of Bihar and another v. P.P. Sharma, IAS and another**, 1992 Supp (1) S.C.C. 222. She has placed reliance on the observations of the Supreme Court at paragraphs 57 and 68, which read as under:-

"57. Equally the finding of the High

Court that the mala fides of the Investigating Officer was established by his subsequent conduct, of his participation in the writ proceedings in our view, is obviously illegal. When the investigation was subject matter of the challenge in the court, it would be obvious that the investigator alone is to defend the case; he has to file the counter-affidavit and to appear in the proceedings on behalf of the State. No exception should be taken to this course and under no circumstances it should be deduced to be a mala fide act. Undoubtedly when it was brought to the notice of the Investigating Officer of the existence of certain documents that throw doubt on the complicity of the accused, it would be salutary that he would also investigate into those aspects vis-a-vis the evidence in his possession to find whether they would throw any doubt on the commission of the offence alleged or otherwise. The omission to investigate into those aspects, by no stretch of imagination would be inferred to be a mala fide act. It may be a bona fide opinion. Undoubtedly, this Court held that mala fides on the part of the complainant would be a factor to be gone into. But no decided case that a charge-sheet was held to be vitiated by mala fides due to omission to exercise statutory power was brought to our notice. The allegation of mala fide and bias are more often made easily, than proved. Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism. Ethics can be defined as the practical normative study of the rightness and wrongness of human conduct. The police investigator faces the most frequent and immediate ethical pressures. Despite many a stress associated with the enforcement and investigation functions, the investigator must adopt a professional and uncompromising attitude. Rather than succumbing to unethical logic and engaging in unprofessional means to justify a

seemingly desirable end, the investigator should realise that no conviction is worth sacrificing one's personal and professional integrity. The allegation of mala fides cause deep incursion on the psychic attitude to uncover the crime and on the effectivity of the investigation. The threat of mala fide would deter an honest and efficient Investigating Officer to probe an in depth investigation into the crime. The result would be that the crime remains undetected and injury is irremediable to the society. Criminal becomes emboldened and people lose faith in the efficacy of law and order. Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to insist upon making specific and definite allegations of personal animosity against the Investigating Officer at the start of the investigation but also must insist to establish and prove them from the facts and circumstances to the satisfaction of the court.

68. Another crucial question is whether the High Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, would interfere and quash the charge-sheet. The High Court found that the documents relied on by the respondents/accused were not denied by the State by filing the counter-affidavit. Therefore, they must be deemed to have been admitted. On that premise the High Court found that no prima facie case was made out on merits and chances of ultimate conviction is "bleak". The court is not passive spectator in the drama of illegalities and injustice. The inherent power of the court under Article 226 of the Constitution of India is permitted to be resorted to. When the documents relied on by the respondents "demonstrate that no prima facie offence is made out on the face value of those materials, then the criminal prosecution should not be allowed to continue and so it should

be quashed", and "in such a situation and circumstances the petitioners who had got a right under the Constitution for the protection of their liberty have rightly approached this Court and this Court in these circumstance has no option but to grant the relief by quashing the FIR and both the charge-sheets". Accordingly it quashed them. If this decision is upheld, in my considered view startling and disastrous consequence would ensue. Quashing the charge-sheet even before cognizance is taken by a criminal court amounts to "killing a stillborn child". Till the criminal court takes cognizance of the offence there is no criminal proceedings pending. i am not allowing the appeals on the ground that alternative remedies provided by the Code as a bar. It may be relevant in an appropriate case. My view is that entertaining the writ petitions against charge-sheet and considering the matter on merit in the guise of prima facie evidence to stand an accused for trial amounts to pre-trial of a criminal trial under Article 226 or 227 even before the competent Magistrate or the Sessions Court takes cognizance of the offence. Once the proceedings are entertained the further proceedings get stayed. Expeditious trial of a criminal case is the cardinal rule. Delay feeds injustice to social order and entertaining writ petitions would encourage to delay the trial by diverse tricks. It is not to suggest that under no circumstances a writ petition should be entertained. As was rightly done by Rajasthan High Court in this case at the instance of the directors of the company, wisdom lies to keep the hands back and relegate the accused to pursue the remedy under the Code. In several cases this Court quashed the criminal proceedings on the sole ground of delay. In a case FIR filed in 1954 for violation of the provisions of the Customs Act and Foreign Exchange Regulation Act was challenged in the Allahabad High Court. It was deliberately kept pending in the High

Court and in this Court till 1990. The accusation was violation of law by named persons in the name of non-existing firms. The FIR was quashed in the year 1990 by another Bench of which I was a member solely on the ground of delay. He achieved his object of avoiding punishment. This would show that an accused with a view to delay the trial, resorts to writ proceedings, raises several contentions including one on merit as vehemently persisted by Sri Jain to consider this case on merits and have the proceedings kept pending. The result would be that the people would lose faith in the efficacy of rule of law. Documents relied on by the respondents are subject to proof at the trial and relevancy. If proved to be true and relevant then they may serve as a defence for the respondents at the trial. The State quite legitimately and in my view rightly did not choose to file the counter-affidavit denying or contradicting the version of the respondents, in those documents. The commission of offence cannot be decided on affidavit evidence. The High Court has taken short course "in annihilating the still born prosecution" by going into the merits on the plea of proof of prima facie case and adverted to those facts and gave findings on merits. Grossest error of law has been committed by the High Court in making pre-trial of a criminal case in exercising its extraordinary jurisdiction under Article 226. After the charge-sheet was filed, the FIR no longer remains sheet-anchor. The charge-sheet and the evidence placed in support thereof form the base to take or refuse to take cognizance by the competent court. It is not the case that no offence has been made out in the charge-sheets and the first information report. It is, therefore, not necessary to consider all the decisions dealing with the scope of the power of the High Court either under Section 482 CrPC or Article 226 of the Constitution to quash the first information report."

The learned counsel has also placed reliance on paragraph 67 of the aforesaid authority to urge before me that the presumption under Section 114(e) of the Evidence Act would be available to the prosecution. The learned counsel has particularly laid emphasis on the observations of the Supreme Court which are reproduced below:-

> "When the Government accorded sanction, Section 114(e) of the Evidence Act raises presumption that the official acts have been regularly performed. The burden is heavier on the accused to establish the contra to rebut that statutory presumption. Once that is done then it is the duty of the prosecution to produce necessary record to establish that after application of mind and consideration thereof to the subject the grant or refusal to grant sanction was made by the appropriate authority."

9. Reliance on this Judgment, according to me, is wholly misplaced in the facts of the present case. In the present case, the prosecution has not been able to prove the sanction order. The sanction order does not bear the seal of the authority issuing the same. The learned trial Court has rightly observed that the sanction orders do not bear the seal of the authority. P.W.1 Sukvani does not identify the signature of the Regional Director, who is alleged to have issued the sanction orders nor does he state that the said sanction orders were signed in his presence. In the absence of

proof of the two documents, at the very threshold, the question whether presumption is available under Section 114(e) of the Evidence Act does not arise for consideration at all.

10. These are appeals against acquittal. The view taken by the trial Court particularly on the point of validity of sanction does not appear to be perverse. This is a view which can be taken on the basis of the material on record. The High Court cannot in an appeal against acquittal substitute its own view to that of the trial Court on appreciation of the evidence unless the view taken by the trial Court is perverse warranting interference. From the perusal of the Judgment and the records and proceedings of the trial Court, I am of the considered opinion that the view taken by the trial Court is a reasonable view on the face of the material on record. Thus, according to me, no interference is called for in the present appeals.

11. In the result, therefore, Criminal Appeals are dismissed.

(P.V. HARDAS)
JUDGE.

ed's.